SUPREME COURT, U.S.
FILED
MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1809

IN THE

Supreme Court of the United States

October Term, 1987

LARRY A. HOFFMAN,
Petitioner,

vs.

GLIDDEN COATINGS & RESINS,
DIVISION OF SCM CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT GLIDDEN COATINGS & RESINS, DIVISION OF SCM CORPORATION IN OPPOSITION

JOHN B. LEWIS, *Counsel of Record*
TOM MCDONALD
GREGORY V. MERSOL
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Attorneys for Respondent
Glidden Coatings & Resins,
Division of SCM Corporation

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTION PRESENTED FOR REVIEW

Petitioner has identified the following as the question presented for review:

> Is summary judgment proper where the issue presented below and here is whether an employer has retaliated against an employee in violation of Title VII, 704(a) which employee was protecting the rights of a female whose rights were protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), where the employer can be charged with knowledge that it is retaliating unlawfully despite the employee's lack of an exact statement to the employer accusing the employer of the unlawful discrimination?

II.

RULE 28.1 STATEMENT

Respondent Glidden Coatings & Resins, Division of SCM Corporation is a wholly owned subsidiary of Imperial Chemicals Industries, PLC.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW I

RULE 28.1 STATEMENT II

TABLE OF AUTHORITIES IV

STATEMENT OF FACTS 2

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN GLIDDEN'S FAVOR SINCE IT WAS NOT AWARE OF HOFFMAN'S ALLEGED MOTIVE TO OPPOSE SEX DISCRIMINATION 4

A. An Employer Cannot Be Held Liable For Retaliation If It Is Not Aware That The Employee Was Engaged In Protected Activity 4

B. Glidden Could Not Have Retaliated Against Hoffman Since It Was Unaware That His Efforts On Behalf Of His Daughter Were Allegedly Directed Towards Preventing Discrimination 5

C. Hoffman's Thoughts Created No Question Of Fact As To Glidden's Knowledge 6

II. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319 (6th Cir. 1983) 6

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982) 4

Cooper v. City of North Olmsted, 795 F.2d 1265 (6th Cir. 1986) 4

Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981) 4

Holden v. Owens-Illinois, 793 F.2d 745 (6th Cir.) *cert. denied*, _____ U.S. _____, 107 S. Ct. 649 (1986) 4

Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983) 6

Weems v. Ball Metal & Chemical Division, Inc., 753 F.2d 527 (6th Cir. 1985) 5

Statute

Title VII of the Civil Rights Act of 1964, Section 704(a), 42 U.S.C. Section 2000e-3(a) 4

Rules

Federal Rule of Civil Procedure 56 5,6

Rule of the Supreme Court of the United States 17 7

No. 87-1809

IN THE

Supreme Court of the United States

October Term, 1987

LARRY A. HOFFMAN,
Petitioner,

vs.

GLIDDEN COATINGS & RESINS,
DIVISION OF SCM CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT GLIDDEN COATINGS & RESINS, DIVISION OF SCM CORPORATION IN OPPOSITION

Respondent Glidden Coatings & Resins, Division of SCM Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner Larry A. Hoffman ("Hoffman") was hired as a paint maker by respondent Glidden Coatings & Resins, Division of SCM Corporation ("Glidden") in 1973. In 1982, Hoffman was promoted to a supervisory position and began a campaign to secure full-time employment for his daughter with Glidden.

As part of this campaign, Hoffman repeatedly hounded management at all levels with inquiries about the possibility of getting his daughter a full-time position. These efforts continued even after the Company explained its anti-nepotism practice to him, and even after he was directly ordered to stop pursuing the matter.

In the meantime, Glidden received complaints from those working under Hoffman that he gave conflicting orders, started arguments, and did not understand the technical aspects of his job. After tolerating a year of Hoffman's harassment on behalf of his daughter and his refusal to concentrate on his performance despite repeated counseling, the Company terminated Hoffman's employment on December 20, 1983.

Following his termination, Hoffman contended that his attempts to obtain a position for his daughter were motivated by a desire to oppose sex discrimination. There was no evidence, however, that he had ever communicated that belief to management. At his deposition, Hoffman testified that while he "thought" his daughter was being treated unfairly, he told management only that he wanted her to be hired for a full-time position. Absent evidence that Glidden was ever aware of Hoffman's alleged intentions, the only

conclusion possible was that Hoffman was terminated because of his substandard performance and the undue pressure he applied to management to secure a job for his daughter.

The United States Magistrate recommended that summary judgment be entered in Glidden's favor since Hoffman had never communicated his thoughts to management. The District Court, after *de novo* review of the Magistrate's decision, granted summary judgment, agreeing that Hoffman's thoughts described only his state of mind. The Sixth Circuit affirmed the granting of summary judgment without opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN GLIDDEN'S FAVOR SINCE IT WAS NOT AWARE OF HOFFMAN'S ALLEGED MOTIVE TO OPPOSE SEX DISCRIMINATION.

A. An Employer Cannot Be Held Liable For Retaliation If It Is Not Aware That The Employee Was Engaged In Protected Activity.

Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a), the so-called "opposition clause", prohibits an employer from retaliating against an employee for opposing a violation of Title VII. *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 748 (6th Cir. 1986). Courts have uniformly held that an employee who fails to demonstrate causation between "protected conduct" and termination cannot establish a prima facie case of retaliation under the opposition clause. *See, e.g., Holden v. Owens-Illinois,* 793 F.2d 745 (6th Cir.) (employee had not opposed conduct constituting a violation of Title VII), *cert. denied,* _____ U.S. _____, 107 S. Ct. 649 (1986); *Cooper v. City of North Olmsted,* 795 F.2d 1265 (6th Cir. 1986) (stating element of causation).

The courts have also uniformly determined that an employer cannot be held liable for retaliation if it is unaware that the employee is engaged in protected activity. *E.g., Choen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982) (employer could not have retaliated against the plaintiff because it made the alleged retaliatory decision before it became aware that she had filed a charge of discrimination); *Gunther v. County of Washington,* 623 F.2d 1303, 1316 (9th Cir. 1979), *aff'd,* 452 U.S. 161 (1981) (employee failed to establish a prima facie case of

retaliation since the employer was unaware of her protected activities at the time of the adverse employment decision); *Weems v. Ball Metal & Chemical Division, Inc.*, 753 F.2d 527, 528 (6th Cir. 1985) (retaliation claim properly dismissed since the employer was unaware that the employee had provided statements to the Equal Employment Opportunity Commission prior to her termination).

B. Glidden Could Not Have Retaliated Against Hoffman Since It Was Unaware That His Efforts On Behalf Of His Daughter Were Allegedly Directed Towards Preventing Discrimination.

Glidden could not have retaliated against Hoffman since it was never aware that he allegedly was seeking to redress discrimination. Hoffman was questioned extensively during his deposition on the exact nature of all his conversations with management. Despite this detailed inquiry, Hoffman could identify *no* instance in which he communicated to any company official his belief that discrimination existed. At best he testified only that he harbored a belief that his daughter was being treated unfairly.

In contrast, Glidden presented competent testimony by affidavit that it was unaware of Hoffman's alleged motive. Hoffman produced no evidence by affidavit, deposition testimony, or otherwise, that Glidden was ever aware of the motives which he concealed. *See* Rule 56(e). Absent such evidence, it was undisputed that Glidden could not have retaliated against Hoffman because it was unaware that he was engaged in protected conduct.

C. Hoffman's Thoughts Created No Question Of Fact As To Glidden's Knowledge.

Glidden does not dispute that, in ruling on a motion for summary judgment, the court must view the evidence in a light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). However, a mere possibility of the existence of a factual dispute, or a "hint" that a question of fact may exist is *insufficient* to justify the denial of a summary judgment motion. *E.g., Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983). There is no requirement that statements be viewed out of context, or that they be distorted to give rise to unnatural inferences not supported by the record.

As stated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." In this case, after ample time for discovery, Glidden moved for summary judgment on the basis that Hoffman had never communicated his alleged motive. Hoffman's failure to present any evidence that his thoughts were ever communicated to management dictated that summary judgment be granted in Glidden's favor.

II. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW.

Rule 17 of the Rules of the Supreme Court of the United States provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such special and important reasons exist in this case.

As Hoffman states throughout his Petition, this unremarkable case concerns only a single question of fact: whether Glidden was aware of his alleged intention to oppose discrimination (Petition at §I and pp. 4-6). Hoffman contends that his thoughts were sufficient to create a genuine issue of material fact as to Glidden's awareness of his motives, while the Courts below did not.

The Sixth Circuit's unanimous ruling was fully consistent with its prior authority. It was also consistent with authority from other circuits and the decisions of this Court. Although Hoffman differs with entry of summary judgment against him, he can point to no conflict between the circuits or any directly contrary authority.

Hoffman's claim is not of national importance. There are, to Glidden's knowledge, no similar cases pending in any court. The ruling below was not even of sufficient importance for any of the lower decisions to be officially published. The Sixth Circuit wrote no opinion at all and, in fact, ruled from the bench during oral argument that Hoffman's claim had no merit. The case simply involved the straightforward application of well established principles to a garden-variety suit in which the plaintiff had no evidence to support his baseless allegations of retaliation.

CONCLUSION

This case does not merit Supreme Court review. The United States Magistrate, District Court, and Sixth Circuit all properly held that Hoffman's mere unarticulated intent to oppose sex discrimination did not create a genuine issue of material fact as to Glidden's knowledge of his reasons. The case presents no conflict between or among the circuits, no conflict with the decisions of this Court, and no issue of such importance as to warrant this Court's intervention.

For all of these reasons, Hoffman's Petition should be denied.

Respectfully submitted,

JOHN B. LEWIS, *Counsel of Record*
TOM MCDONALD
GREGORY V. MERSOL
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Attorneys for Respondent
Glidden Coatings & Resins,
Division of SCM Corporation